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CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BY *WJB* DEPUTY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

NILSON OROBIO-MINDINERO,  
Petitioner,  
vs.  
UNITED STATES OF AMERICA,  
Respondent.

CASE NOS. 13-CV-2227-BEN  
12-CR-3815-BEN-3

**ORDER DENYING  
28 U.S.C. § 2255 MOTION**

Petitioner Nilson Orobio-Mindinero moves pursuant to 28 U.S.C. § 2255 for a reduction in his sentence based on his alien status and challenges Bureau of Prisons' policies which preclude him from participating in certain pre-release programs. Both because he waived the right to challenge his sentence and because his Equal Protection argument lacks merit, the Court **DENIES** the motion.

**DISCUSSION**

**I. WAIVER**

The Ninth Circuit recognizes strong public policy considerations justifying the enforcement of a defendant's waiver of his right to appeal or collaterally attack a judgment. *United States v. Novarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990). Waivers play an important role in the plea bargaining process and help ensure finality. *Id.* at 322. Generally, courts enforce a defendant's waiver of his right to appeal, as long as the waiver was "knowingly and voluntarily made" and "encompasses the

1 defendant's right to appeal on the grounds claimed on appeal." *United States v. Nunez*,  
 2 223 F.3d 956, 958 (9th Cir. 2000) (quoting *United States v. Martinez*, 143 F.3d 1266,  
 3 1270-71 (9th Cir. 1998)).

4 Petitioner waived his right to collaterally attack his sentence in his plea  
 5 agreement. Plea Agreement (Docket No. 67) ¶ XI. The plea agreement states that  
 6 Petitioner "waives, to the full extent of the law, any right to appeal or to collaterally  
 7 attack the conviction and any lawful restitution order, except a post-conviction  
 8 collateral attack based on a claim of ineffective assistance of counsel." *Id.* Petitioner's  
 9 knowing and voluntary waiver of his right to collaterally attack his sentence requires  
 10 denial of his § 2255 motion.

## 11 II. EQUAL PROTECTION

12 Petitioner filed the present motion under 28 U.S.C. § 2255, but his Equal  
 13 Protection challenge to the constitutionality of certain Bureau of Prisons' policies is  
 14 better construed as a challenge to the manner in which his sentence is being executed  
 15 under 28 U.S.C. § 2241. *See Hernandez v. Campbell*, 204 F.3d 861, 864 (9th Cir.  
 16 2000) (per curiam) (instructing that petitions challenging the "manner, location or  
 17 conditions of a sentence's execution must be brought pursuant to § 2241"); *see also*  
 18 *Montano-Figuero v. Crabtree*, 162 F.3d 548, 549 (9th Cir. 1998) (illustrating that  
 19 challenges to Bureau of Prisons' policies are challenges to the execution of an inmate's  
 20 sentence). Construing his motion liberally, the Court considers Petitioner's Equal  
 21 Protection claim under 28 U.S.C. § 2241. *See Zichko v. Idaho*, 247 F.3d 1015, 1020  
 22 (9th Cir. 2001) (noting a court's "duty to construe pro se pleadings liberally").

23 Petitioner claims that Bureau of Prisons' policies that prevent him from  
 24 participating in certain programs due to his alien status violate his right to Equal  
 25 Protection. However, Bureau of Prisons policies preventing deportable aliens from  
 26 participating in certain programs survive constitutional challenge. *Cf. McLean v.*  
 27 *Crabtree*, 173 F.3d 1176, 1186 (9th Cir. 1999) (finding BOP exclusion of prisoners  
 28 with detainers, including INS detainers, from community-based program based on

1 petitioners' alien status did not violate Equal Protection).

2        Additionally, a number of district courts have also found that policies preventing  
3 alien prisoners from participating in certain pre-release programs are also justified  
4 because the purpose of the program — helping prisoners reenter the community after  
5 serving their sentence — is not advanced in the case of prisoners who will be deported  
6 upon release. *See Lizarraga-Lopez v. United States*, 89 F. Supp. 2d 1166, 1169-70  
7 (S.D. Cal. 2000) (upholding deportable alien's ineligibility for community  
8 confinement); *United States v. Rodas-Jacome*, No. 06-CV-1481, 2007 WL 1231630,  
9 at \*4 (S.D. Cal. Apr. 24, 2007) (upholding restrictions for alien prisoners to obtain  
10 "good time" credits in rehabilitation programs). Because deportable alien prisoners  
11 pose a greater flight risk and the public policy justifications for pre-release programs  
12 are inapplicable, the challenged policies survive constitutional scrutiny and Petitioner's  
13 Equal Protection claim fails. The Court also denies relief under § 2241.

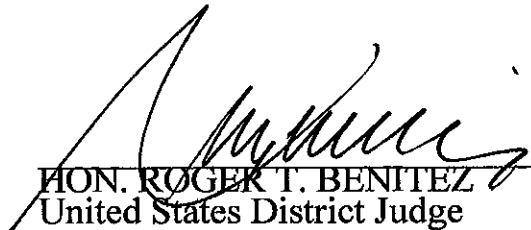
14        The Court **DENIES** a certificate of appealability because the issues are not  
15 debatable among jurists of reason and there are no questions adequate to deserve  
16 encouragement.

### 17 CONCLUSION

18        Petitioner's motion is **DENIED**. The Clerk shall close case number 13-CV-  
19 2227-BEN.

20 **IT IS SO ORDERED.**

21  
22 DATED: September 21, 2013

  
23 HON. ROGER T. BENITEZ  
24 United States District Judge  
25  
26  
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